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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VICTOR LOPEZ et al., Defendants and Appellants.	F053389 (Super. Ct. Nos. 1064916 & 1062616) **OPINION**

APPEALS from judgments of the Superior Court of Stanislaus County. Donald E. Shaver, Judge.

A. M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant Victor Lopez.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant Antonio Barajas.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Brian Alvarez and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts 1 through 7.

On the evening of August 24, 2003, a car carrying two Sureño criminal street gang members – Victor Lopez, the driver, and Antonio Barajas, the passenger – stopped inside a gang-infested alley in a high-crime Modesto neighborhood. Eric Adorno, standing next to a van with a red bandanna on the steering column and wearing a red jersey, blue jeans, and red and white shoes, walked up to the car. A bullet fired from the passenger side of the car struck Adorno between the eyebrows and killed him. Police observed a red baseball cap on the ground near his head. Red is the color commonly associated with the Norteños criminal street gang.

A jury found Barajas and Lopez guilty of first degree murder, found criminal street gang allegations true as to both, and found true as to Barajas an allegation of personal and intentional discharge of a firearm causing death. (Pen. Code, §§ 187, subd. (a), 186.22, subd. (b)(1), 12022.53, subd. (d).)[1] The trial court sentenced Barajas to 50-to-life (25-to-life for first degree murder and 25-to-life consecutively for the firearm enhancement) and sentenced Lopez to 25-to-life for first degree murder.

ISSUES ON APPEAL

Nine issues arise on appeal. Two are evidentiary. Barajas and Lopez (1) argue insufficiency of the evidence that the Sureños were a criminal street gang and (2) characterize as prejudicial error the trial court's ruling that a university sociology professor could not testify that gang culture would have prevented premeditation and instead given rise to an actual belief in the need for self-defense.

Three issues challenge jury instructions. (3) Lopez argues the trial court's instructing with CALCRIM No. 355 on a defendant's right not to testify without modifying the instruction to reflect his testifying in his own defense impermissibly lowered the prosecution's burden of proof. Barajas and Lopez argue (4) that CALCRIM

[1] Later statutory citations are to the Penal Code except where otherwise noted.

No. 521 erroneously conflated the elements of first degree murder and impermissibly lowered the prosecution's burden of proof by precluding the possibility of a second degree murder verdict and (5) that the trial court's rereading of certain instructions was a prejudicially inadequate response to the jury's request for clarification.

Additionally, Barajas and Lopez argue (6) that the section 1203.1l emergency medical services restitution fines which the statute authorizes solely "as a condition of probation," must be stricken from the judgments since neither Barajas nor Lopez received a grant of probation and (7) that cumulative error requires reversal of the judgments. Finally, Lopez (8) argues that his deputy public defender's representation of him after the disclosure of a prosecution witness's prior representation by her office was a conflict of interest and (9) challenges the trial court's denial of his midtrial *Marsden*[2] motion as "not timely."

As to both judgments, we will remand with directions to the trial court to strike the section 1203.1l restitution fines. Otherwise we will affirm Barajas's judgment. With reference to Lopez's judgment, we will reverse and remand with directions to the trial court to conduct a posttrial *Marsden* hearing and to exercise judicial discretion to order a new trial, to reinstate the judgment, or to proceed otherwise as authorized by law.

DISCUSSION

1. Barajas and Lopez: Sufficiency of the Evidence

Barajas and Lopez argue an insufficiency of the evidence that the Sureños were a criminal street gang. The Attorney General argues the contrary.

By statute, a "criminal street gang" is (1) an "ongoing" group that has three or more persons with a "common name or common identifying sign or symbol" and (2) that has as one of its "primary activities" the commission of one or more crimes specified in

[2] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

the statute and (3) whose members individually or collectively engage in a "pattern of criminal gang activity." (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 610-611; § 186.22, subd. (f).) Challenging the sufficiency of the evidence of the second and third elements, Barajas and Lopez rely, inter alia, on the testimony of a university sociology professor to argue that Norteños and Sureños are not criminal street gangs but "umbrella organizations sharing a common philosophy."[3] The gang expert on whom the prosecution relied had qualified as a Stanislaus County gang expert in some 40 to 70 trials, had conducted debriefings of high-ranking gang members who had to "give everything up" in return for protective custody, and had shared his expertise on Stanislaus County gangs at the request of the FBI on a weekly basis. !(9 RT 2389-2391)!

With specific reference to the second element ("primary activities"), the gang expert answered the question about the "primary felonious activities" of members of Sureño criminal street gangs in Stanislaus County, "Murder, attempted murder, drive-by shootings, assault with a deadly weapon, weapons possession, weapons distribution, possession for sales of a variety of drugs, mayhem, torture, kidnapping, carjacking, [and] auto theft" as specified in the statute. (§ 186.22, subd. (e).) The element of primary activities is a proper subject of expert opinion that can be satisfied by a gang expert's testimony. (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1004-1005; see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 (*Sengpadychith*); *People v. Gardeley* (1996) 14 Cal.4th 605, 620 (*Gardeley*).)

With specific reference to the third element ("pattern of criminal gang activity"), the gang expert testified that Sureño criminal street gang members Jesus Alvarez and

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[3] Barajas and Lopez rely, inter alia, on a police journal article admitted into evidence as Defendant's Exhibit H. Testimony about the article is cryptic, the exhibit is not in the clerk's transcript, and Barajas and Lopez failed to transmit the exhibit to this court. (Cal. Rules of Court, rules 8.224(a), 8.320(e); cf. *People v. Preslie* (1977) 70 Cal.App.3d 486, 491.)

Victor Garcia were convicted of assault with a deadly weapon in association with and for the benefit of a criminal street gang for firing shots at Norteños in the alley where Adorno was shot and killed. The gang expert also testified that Barajas was convicted of felony assault in association with and for the benefit of a criminal street gang for attacking, breaking the teeth of, removing part of the tongue of, and yelling gang epithets at a man at a time when Barajas was in the company of Sureño criminal street gang members Juan Lopez, Francisco Sanchez, and Jovan Zepeda. Crimes like those and the charged murder can satisfy the prosecution's burden of proof of a pattern of criminal gang activity. (See *Sengpadychith, supra,* 26 Cal.4th at pp. 322-323; *Gardeley, supra,* 14 Cal.4th at p. 625; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1383.)

In a corollary argument, Barajas and Lopez, members of Sureños Por Vida and Little Town Sureños, respectively, characterize those subsets of the Sureños as "different criminal street gangs that were barely mentioned or described at trial" and argue that the prosecution "failed to prove that the Sureños engage in specific primary activities known to [them]." First, the gang expert testified that the Sureños Por Vida and the Little Town Sureños were subsets of the larger Sureño criminal street gang. Criminal street gang evidence need not "be specific to a particular local street gang" of "the larger [Sureño] organization." (*In re Jose P.* (2003) 106 Cal.App.4th 458, 467.) Second, the element of the criminal street gang *crime* that gang members have the "*knowledge* that its members engage in or have engaged in a pattern of criminal gang activity" is different from the element of the criminal street gang *enhancement* that gang members have the "*specific intent* to promote, further, or assist in any criminal conduct by gang members." (Compare § 186.22, subd. (a), with § 186.22, subd. (b)(1), italics added.) From the gang evidence in the record, the jury permissibly and reasonably could infer the requisite specific intent. (Cf. *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 (*Frank S.*).)

On review of a sufficiency of the evidence challenge, our duty is to examine the entire record in the light most favorable to the judgment, presume the existence of every

fact the trier could reasonably deduce from the evidence in support of the judgment, and determine whether credible and reasonable substantial evidence of solid value supports the judgment. (*Frank S., supra*, 141 Cal.App.4th at p. 1196.) Applying that standard, we reject Barajas's and Lopez's challenge to the sufficiency of the evidence.

2. Barajas and Lopez: Preclusion of Certain Expert Testimony

Barajas and Lopez characterize as prejudicial error the trial court's ruling that a university sociology professor could not testify that gang culture would have prevented premeditation and instead given rise to an actual belief in the need for self-defense. The Attorney General argues the contrary.

The trial court held a hearing on the admissibility of the proffered testimony of Martin Sanchez Jankowski, professor of sociology at the University of California at Berkeley and author of *Islands in the Street: Gangs and American Urban Society,* a book based on his 10 years of personal access to 37 gangs of various ethnicities in several American cities. After writing his book, he engaged in a nine-year study of gang members interacting in local communities to see how gangs as social institutions help and hurt community organization. He then worked as an anti-gang project consultant to police agencies, to city governments like Salinas and San Jose, and to federal agencies like the Centers for Disease Control and the Department of Justice. The defense retained him to evaluate mental state at the time of the shooting.

Acknowledging that he did not consider himself an expert on Modesto and that he did not remember interviewing any gang members from Modesto, Jankowski testified on the basis of his review of police reports that a virtual war between Norteños and Sureños in Modesto was in progress at the time of Adorno's death. Considering the numerous gun fights and drive-by shootings during the previous several years at the address where Adorno was shot to death, the shooting homicides of two other people at the address just months before his death, and the shots fired in the alley a couple of times earlier on the

day of his death, Jankowski testified that the address was a "very hot area" and a "free-fire zone" at the time of his death. Everybody at the address, in the alley, and in the neighborhood, he testified, would experience a heightened level of vigilance for potential violence, a heightened sensitivity to the need for self-defense, and a diminished ability to deliberate about the consequences of one's actions. The sociology of the gang, the events at the address over the years, and the shots fired earlier on the day of Adorno's death could have created in Barajas's and Lopez's minds not only "an inability to premeditate and deliberate" but also "a skewed view of the necessity for self-defense."

On that record, the defense proffered Jankowski's testimony on the mental states of "[m]alice aforethought, as opposed to a rash impulse; premeditation and deliberation, as opposed to a rash impulse; and the effect of those stressors on his perception as to the need for self-defense, where a reasonable person may not so find." After argument by counsel, the trial court found Jankowski "eminently qualified" to testify "about whether or not the defendants were gang members or the acts that they did were for the benefit of the gang, and the traditional issues that are raised by 186.22" but not "to express an opinion on issues relating to malice, premeditation, or the need for self-defense, or group dynamic as it relates to self-defense, or the stressors as they relate to self-defense."

In general, "expert testimony concerning the culture, habits, and psychology of gangs is permissible" in cases with criminal street gang allegations "because those subjects are 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506 (*Valdez*), citing, inter alia, Evid. Code, § 801 subd. (a); *Gardeley, supra,* 14 Cal.4th at p. 617.) "Psychologists, psychiatrists or sociologists may have specialized empirical knowledge regarding the range of reactions to a given provocation, or the reaction of the statistically average individual in a given community," but "this information would not materially assist the jury in its task" because "the jury must determine not only if the reaction is ordinary but if it is reasonable, and that determination depends more on (perhaps

unarticulated) community norms than on empirically discoverable averages." (*People v. Czahara* (1988) 203 Cal.App.3d 1468, 1478.) So "the reasonableness of a reaction is left to the jurors precisely so that they may bring their common experience and their own values to bear on the question of whether the provocation partially excused the violence." (*Ibid.*)

Barajas and Lopez argue that the trial court's ruling was not only an abuse of discretion but also a violation of federal constitutional rights to counsel, due process, and equal protection and the right to present a defense. The standard of review of a trial court's ruling on the admissibility of gang evidence is abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) A showing of a clear abuse of discretion is necessary before an appellate court interferes with a trial court's discretion. (*Valdez, supra,* 58 Cal.App.4th at p. 506.) Here, the requisite showing is absent from the record. Since the premise implicit in Barajas's and Lopez's constitutional arguments is that the trial court's ruling was an abuse of discretion, the constitutional arguments are equally meritless. (See *People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3; cf. *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919.)

3. Lopez: Instruction on Witness Not Testifying

Lopez argues that the trial court's instructing with CALCRIM No. 355 on a defendant's right not to testify without modifying the instruction to reflect his testifying in his own defense impermissibly lowered the prosecution's burden of proof. The Attorney General argues the contrary.

After Lopez testified in his own defense and Barajas did not, the trial court instructed the jury as follows with CALCRIM No. 355 on a defendant's right not to testify: "A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that a

defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way." Notwithstanding the absence of a defense objection, Lopez argues that he did not forfeit the right to appellate review. The Attorney General argues the contrary. In the interest of judicial efficiency, we will address the merits of Lopez's argument.

"*By implication*," Lopez argues, CALCRIM No. 355 informed the jury that the reason he testified was "because he deemed it necessary to testify to counter the strength of the prosecution evidence." (Italics added.) "*That implication,*" he claims, "effectively reduced the prosecution's burden of proof and violated [due process] by *suggesting* that [he] bore some burden of explanation or justification." (Italics added.)

First, Lopez argues not the wording of the instruction but only an *implication* and a *suggestion* that he ascribes to the instruction. Second, CALCRIM No. 355 referred to "defendant" in the singular, so the jury presumably understood the instruction to refer not to Lopez, who did testify, but only to Barajas, who did not testify. Third, the charge to the jury correctly instructed on the presumption of innocence and on the prosecution's burden of proof beyond a reasonable doubt. (CALCRIM No. 220.) Fourth, the case law has consistently rejected challenges to CALCRIM No. 355. (See, e.g., *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1191-1192; *People v. Anderson* (2007) 152 Cal.App.4th 919, 941.) Writing about an instruction that has likewise withstood repeated appellate scrutiny, the United States Supreme Court observed: "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." (*Boyde v. California* (1990) 494 U.S. 370, 380-381.)

On appeal, we presume jurors are intelligent people capable of understanding, correlating, and following the instructions and applying them to the facts of the case.

(*People v. Carey* (2007) 41 Cal.4th 109, 130 (*Carey*); *People v. Alfaro* (2007) 41 Cal.4th 1277, 1326 (*Alfaro*).) The standard of review of an instruction challenged on appeal as ambiguous is whether there is a reasonable likelihood that the jury applied the instruction in a way that denied fundamental fairness. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73 (*McGuire*); *People v. Clair* (1992) 2 Cal.4th 629, 663 (*Clair*).) Lopez fails to make the requisite showing.

4. Barajas and Lopez: CALCRIM No. 521

Barajas and Lopez argue that CALCRIM No. 521 erroneously conflated the elements of first degree murder and impermissibly lowered the prosecution's burden of proof by precluding the possibility of a second degree murder verdict. The Attorney General argues the contrary.

The California Supreme Court has consistently rebuffed challenges to CALJIC No. 8.20,[4] the predecessor to CALCRIM No. 521.[5] (*People v. Milwee* (1998) 18 Cal.4th

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[4] CALJIC No. 8.20 provided: "All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree. [¶] The word 'willful,' as used in this instruction, means intentional. [¶] The word 'deliberate,' which relates to how a person thinks, means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. [¶] The word 'premeditated' relates to when a person thinks and means considered beforehand. One premeditates by deliberating before taking action. [¶] If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. [¶] The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. [¶] The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree. [¶] To constitute a deliberate and premeditated killing, the slayer must weigh and

96, 135, fn. 13; *People v. Perez* (1992) 2 Cal.4th 1117, 1123; *People v. Lucero* (1988) 44 Cal.3d 1006, 1021.) The two instructions are conceptually comparable. Both inform the jury that killings with premeditation and deliberation are of the first degree. Both inform the jury that deliberation requires not only a careful weighing of the considerations for and against a proposed choice but also knowledge of the consequences before deciding to kill. Both inform the jury that the test of whether a decision to kill results from premeditation and deliberation is not the length of time but the extent of reflection.

On review of a challenge to jury instructions, our duty is to consider the entire charge, not just parts of an instruction or a particular instruction. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) As CALCRIM No. 521 informed Barajas's and Lopez's

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consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, [he] [she] decides to and does kill."

5 The trial court instructed the jury as follows with CALCRIM No. 521: "If you decide that a defendant has committed murder, you must decide whether it is murder of the first or second degree. [¶] A defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before committing the act that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection. The length of time alone is not determinative. [¶] All other murders are of the second degree. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

jury that murder not of the first degree is of the second degree, so CALCRIM No. 522[6] stated that provocation may reduce a murder from first degree to second degree.

On appeal, we presume jurors are intelligent people capable of understanding, correlating, and following the instructions and applying them to the facts of the case. (*Carey, supra,* 41 Cal.4th 109 at p. 130; *Alfaro, supra,* 41 Cal.4th at p. 1326.) The standard of review of an instruction challenged on appeal as ambiguous is whether there is a reasonable likelihood that the jury applied the instruction in a way that denied fundamental fairness. (*McGuire*, *supra*, 502 U.S. at pp. 72-73; *Clair*, *supra*, 2 Cal.4th at p. 663.) Barajas and Lopez fail to make the requisite showing.

5. Barajas and Lopez: Jury Request for Clarification of Instructions

Barajas and Lopez argue that the trial court's rereading of certain instructions was a prejudicially inadequate response to the jury's request for clarification. The Attorney General argues the contrary.

During deliberations, the jury sent a note asking that the trial court "break down the definitions of 1st & 2nd degree murder in lay terms. The instructions are very confusing. We also have questions as to the definition of premeditation. We would like to have examples if possible. We feel that counsel did not explain this well enough for the group to understand. Instructions were clear as mud. During jury selection, we were told that all terms would be made clear for everyone to understand."

With the express concurrence of Barajas's attorney, Lopez's attorney, and the prosecutor, the trial court responded to the jury's note by reading the texts (originally

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6 The trial court instructed the jury as follows with CALCRIM No. 522: "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendants committed murder but were provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

read to the jury) and the titles (not previously read to the jury) of (in the following order) CALCRIM Nos. 500 ("Homicide, general principles"), 520 ("Murder with malice aforethought"), 521 ("Murder, degrees"), 522 ("Provocation effect on the degree of murder"), 505 ("Justifiable homicide. Defense or defense of another"), 571 ("Voluntary manslaughter, imperfect self-defense, lesser included offense"), 3472 ("The right to self-defense may not be contrived"), 625 ("Voluntary intoxication, effects on homicide case"), 3428 ("Mental impairment, defense to specific intent or mental state"), and 580 ("Voluntary manslaughter, lesser included offense") "so it's clear to them what principle the instruction is about."

Barajas and Lopez argue that neither forfeited the right to appellate review and, alternatively, that failure to preserve the issue for appellate review constituted ineffective assistance of counsel. The Attorney General argues the contrary. In the interest of judicial efficiency, we will address the merits of Barajas's and Lopez's argument.

Barajas and Lopez characterize the trial court's response of rereading the text (originally read) and reading the title (not previously read) of each of the instructions at issue as "[s]imply throwing up its hands and doing nothing in the face of jury confusion." The record shows otherwise. The trial court not only asked counsel for suggestions as to which instructions to reread but also implored counsel, "And if you want to do anything else besides just reread instructions, you can let me know that too." An off-the-record colloquy among counsel ensued, but no one asked the trial court to do anything different. Just before rereading the texts and reading the titles of the instructions at issue, the trial court explained to the jury that the law "really doesn't permit me to just explain things offhand or start lecturing like you might do if you were in a classroom setting." After the trial court reread the texts and read the titles of those instructions, a juror told the trial court, "Thank you." No other comment or request from the jury for additional clarification is in the record.

In reliance on, inter alia, *People v. Gonzales* (1999) 74 Cal.App.4th 382 (*Gonzales*), Barajas and Lopez argue that the trial court breached its duty under section 1138[7] to give the jury the information requested during deliberations. In *Gonzales*, the instructions at issue were "inadequate," so a mere rereading breached that duty. (*Gonzales*, *supra*, at p. 391.) Here, on the other hand, the instructions at issue were adequate. (*Ante*, part 4.) *Gonzales* is inapposite.

"Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) "The court has a primary duty to help the jury understand the legal principles it is asked to apply," but that "does not mean the court must always elaborate on the standard instructions." (*Ibid.*) "Indeed," "comments diverging from the standard are often risky." (*Ibid.*) Only after conferring with, and soliciting suggestions from, all three counsel did the trial court here fashion a response to the jury's note. The record shows no error.

6. Barajas and Lopez: Restitution Fines

Barajas and Lopez argue, the Attorney General agrees, and we concur that the section 1203.1l emergency medical services restitution fines, which the statute authorizes solely "as a condition of probation," must be stricken from the judgment since neither Barajas nor Lopez received a grant of probation. We will grant the relief sought.

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[7] Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

7. Barajas and Lopez: Cumulative Error

Barajas and Lopez argue that cumulative error requires reversal of the judgments. Since our review of the record shows neither evidentiary nor instructional error, there is no basis for reversal of the judgments on the basis of cumulative error. (*People v. Raley* (1992) 2 Cal.4th 870, 921.)

8. Lopez: Conflict of Interest

Lopez argues that his deputy public defender's representation of him after the disclosure of a prosecution witness's prior representation by her office was a conflict of interest. The Attorney General argues the contrary.

On May 11, 2007, day 26 of the 42-day jury trial, Lopez's attorney and one of her colleagues from the public defender's office appeared in court. Her colleague said he had learned just days earlier that his office had represented prospective witness Carlos Chavez on an escape prior but that nowhere in the case management system that the district attorney's office and the public defender's office shared did Chavez "show up as a witness in this case." As to "whether or not we have a conflict," her colleague said that they "know nothing about that conviction other than that there is a conviction" and that neither he nor she had spoken about Lopez's case with the former deputy public defender who had represented Chavez on the escape prior.

The trial court inquired whether the public defender's office intended to declare a conflict if the prosecutor were to call Chavez as a witness. Lopez's attorney and her colleague both requested a continuance to investigate and to confer with the county public defender. With the concurrence of the prosecutor and Chavez's attorney, the trial court put the matter over to the following week.

On May 16, 2007, day 28 of the 42-day jury trial, the trial court and half a dozen attorneys – Lopez's attorney, her colleague, the county public defender, the prosecutor, Barajas's attorney, and Chavez's attorney – discussed the circumstances under which Chavez might testify. Chavez's attorney expressed his client's willingness to waive any

conflict of interest arising from his prior representation by the public defender's office and to testify for the prosecution if he were to receive use immunity, transactional immunity, and a release from custody. The prosecutor agreed to all three conditions. Chavez's attorney noted parenthetically that "obviously, there's another side that has to waive also," but the trial court replied, "I don't know that. I'm just trying to find out what you want to do. Then we'll talk to everybody else to see what they want to do." After the trial court inquired, "So are there any other conflict issues anybody wants to waive then before we proceed tomorrow?," Lopez's attorney responded:

> "[LOPEZ'S ATTORNEY]: Mr. Lopez has informed us that he does not intend to waive the conflict."
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> "THE COURT: Well, I haven't heard that there's a conflict.
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> "[LOPEZ'S ATTORNEY]: He believes that there is.
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> "THE COURT: Well, I need to hear that, though, from the attorney. I don't generally take the client's word that there's a conflict, and if the attorney doesn't tell me anything, I'm taking that at face value.
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> "[LOPEZ'S ATTORNEY]: He believes there's a conflict because of our former representation of Mr. Chavez in both Juvenile Court and in the adult Superior Court and, apparently, we represented him and appeared with him as recently as April of this year.
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> "THE COURT: Do you want to put anything factually on the record about that?
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> "[LOPEZ'S ATTORNEY]: Well, I can't. When this issue first arose, I contacted [the county public defender] wanting initially to set up an appointment for [my colleague] and I to speak to [the county public defender]. As it turns out, he was getting ready to leave the office; I was calling from the Court. So as an alternative, he asked me to explain the situation, which I did, and there was some – a questioning and answering passed between us, and when I finished providing a recitation of the facts, as I understood them, he opined there was no conflict.
>
> "THE COURT: "'He' being [the county public defender]?

"[LOPEZ'S ATTORNEY]: "'He' being [the county public defender]."

After citing a journal and a case on the issue of waiver, Lopez's attorney told the trial court that the county public defender "instructed me not to read the Chavez file, to not speak with [the former deputy public defender] who, we understand, represented him in the escape case" on which he was in custody. Noting for the record the presence of Lopez's attorney, her colleague, and the county public defender, the trial court asked, "Does anybody think that there's a conflict, any of the three of you think there's a conflict, then?" Lopez's attorney added, "There was one other thing I forgot to say. He specifically directed that we not declare the conflict. With that in mind, on some level at least, it doesn't matter what I think about the conflict."

Once the county public defender put his position on the record, the trial court quickly resolved the issue against Lopez:

> "THE COURT: Well, what is the public defender position? Let me just put it that way.
>
> "[COUNTY PUBLIC DEFENDER]: Your Honor, I will articulate that for you. I think there is no conflict in this case. I have looked at the [case Lopez's attorney cited]; I've researched the law. I have no information nor even a hint of information that we received anything confidential from Mr. – I think Chavez – the potential witness, in our prior representation of him. We certainly won't and don't intend to undertake further representation of him should his case come on calendar for apparently some kind of sentence modification or custody terms' modification; that would be up to [Chavez's attorney]. And in light of that, I see no conflict of interest."
>
> "THE COURT: Okay. Good. So it looks like then we can be back here tomorrow morning at 9:30 with Mr. Chavez."

Chavez testified that just minutes after Barajas and Lopez showed up at the house where he and others were "kickin' back" shortly before the homicide Barajas said there were "busters in the alley" so he "wanted to go check it out," "pull a job," and "go beat the busters in the alley." Chavez testified that "busters" were members of the opposite gang and that "pulling a job" probably meant "go fight with them." Minutes after

Barajas and Lopez took off together, Chavez heard a single gunshot. When Barajas and Lopez came back to the house a few hours later, Chavez asked Barajas "what had happened and he said that somebody had got shot." About a week later, Chavez asked Barajas if he had shot the person in the alley. Barajas said, "Yeah. Don't trip. Don't worry about it."

Impeached on cross-examination, Chavez acknowledged that he was in custody, that he had recent convictions of auto theft and escape from jail, and that he had five months left to serve. He testified only after the district attorney agreed not to prosecute him for the homicide and let him serve out his sentence on electronic home monitoring due to a death threat he received in county jail.

With commendable candor, Lopez acknowledges that no United States Supreme Court case is on point, that California case law fails to support his argument (see, e.g., *People v. Cox* (2003) 30 Cal.4th 916, 948-951 (*Cox*); *People v. Clark* (1993) 5 Cal.4th 950, 1001-1002 (*Clark*); *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566, 1581 (*Rhaburn*)), and that our duty as an intermediate appellate court is to follow the decisional law of the our Supreme Court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Here, as in *Cox*, *Clark*, and *Rhaburn* alike, ample indicia of the *absence* of a conflict of interest are in the record. For example, Lopez's attorney never represented Chavez or possessed any confidential information about him. Nor, insofar as the county public defender was aware, did anyone in the office ever receive anything confidential from Chavez. In addition, the county public defender carefully instructed Lopez's attorney not to read Chavez's file and not to speak with the deputy public defender who represented Chavez before leaving the public defender's office.

In the absence of any support in California case law, Lopez relies on a State Bar opinion and on a State Bar rule of professional conduct. In his words, the crux of the State Bar opinion is "that the entire public defender's office should be disqualified from representing a defendant if a previous client is also involved in the case as a potential

witness." Quite to the contrary, the State Bar opinion addresses the far narrower issue of "whether an attorney may represent a client in the common situation which occurs in public defender offices" not only "when a new client's case involves activities of a former client of the public defender" but also when "*the proposed client has been arrested as the result of the cooperation of a former client with law enforcement agents*." (State Bar Standing Com. on Prof. Responsibility & Conduct, Formal Opn. No. 1980-52, italics added.) Nothing in the record here shows, let alone intimates, Chavez's cooperation with law enforcement agents in Lopez's arrest.

Indeed, as the State Bar opinion digest carefully notes, "It is improper for counsel in a criminal case to represent a defendant where a previous client of that attorney's office is a witness against the new client *and it is reasonably foreseeable that the confidences or secrets of the former client may be, or reasonably appear to the client to be, used.*" (State Bar Standing Com. on Prof. Responsibility & Conduct, Formal Opn. No. 1980-52, italics added.) Here, since no showing is in the record that the public defender's office ever received anything confidential from Chavez, no issue arises about either the reasonable foreseeability or the reasonable appearance of its use.

The State Bar rule of professional conduct on which Lopez relies states, "A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained *confidential information material* to the employment." (Cal. Rules of Prof. Conduct, rule 3-310(E), italics added.)[8] First, no showing is in the record that Lopez's attorney obtained any confidential information from Chavez. Second, a justification "for declining to apply a

[8] Lopez cites rule 3-310(D), but paraphrases the content of rule 3-310(E), of the California Rules of Professional Conduct. So as not to elevate form over substance, we construe his argument as relying on the latter.

rigid presumption [of possession of confidential information]" in the context of representation by the public defender's office "is that '[u]nlike their private sector counterparts, public sector lawyers do not have a financial interest in the matters on which they work'" so "'they may have less, if any, incentive to breach client confidences.'" (*Rhaburn, supra*, 140 Cal.App.4th at p. 1579.) Third, since Lopez's attorney never had "a 'direct and personal' relationship" with Chavez, whom a former colleague no longer with the public defender's office once represented, "the courts should normally be prepared to accept the representation of counsel, as an officer of the court, that he or she has not in fact come into possession of any confidential information acquired from the witness and will not seek to do so." (*Id.* at p. 1581.) Lopez's reliance on the State Bar rule, like his reliance on the State Bar opinion, is misplaced.

To obtain relief on appeal, the defendant must show either an actual conflict that adversely affected counsel's performance (*People v. Lawley* (2002) 27 Cal.4th 102, 146) or informed speculation with a factual basis in the record about a potential conflict that adversely affected counsel's performance (*People v. Roldan* (2005) 35 Cal.4th 646, 674 (*Roldan*)) and an abuse of discretion by the trial court in denying his or her motion to disqualify counsel (*Rhaburn, supra*, 140 Cal.App.4th at p. 1573). Since none appears here, Lopez fails to discharge his burden on appeal. With candor equally commendable as before, he acknowledges that the goal of his conflict of interest argument is "to obtain consideration of this issue in this Court and to preserve the issue for reconsideration in the California Supreme Court and for federal review." Duly noted.

9. Lopez: Midtrial* Marsden *Motion

Lopez challenges the court's denial of his midtrial *Marsden* motion as "not timely." The Attorney General agrees that the denial of Lopez's *Marsden* motion on that ground was error but argues harmless error.

The history of Lopez's midtrial *Marsden* motion commences with three pretrial in camera *Marsden* hearings, at each of which he sought a substitution of attorneys on the ground of a conflict of interest with the public defender's office. At his first *Marsden* hearing, on September 14, 2005, he informed the trial court that he had "witnesses on my case that have arrest histories and I tried to find out if there was a conflict in our case, if they were being represented by the public defender's office at one time or another. They refused to tell me." He added, "There's witnesses, even codefendants, that have arrest histories too." The trial court asked, "But you didn't get the criminal histories or the arrest histories of the witnesses?" He replied, "I didn't want the arrest histories, I just wanted to know if they were represented at one time or another."

Asked by the trial court to address Lopez's concerns, his attorney, noting that she had represented him continuously since he was taken into custody two years earlier, distinguished her responsibility to do conflict checks from the county public defender's responsibility to declare conflicts: "One of the first things that I did after we'd been assigned the case was to review the police reports. Not only for content, but to identify potential witnesses and do conflicts checks. And that review did not show any of the conflicts that my supervisor would accept. [¶] So [even if] we might, for example have represented some of these people in misdemeanors years ago, [the county public defender] would not approve declaring a conflict on former clients unless there was something very special about the situation. [¶] So I explained that to Mr. Lopez." She said that "the only thing that Mr. Lopez wanted us to investigate for him" was to "interview the girlfriend" and prepare a report and that the public defender's investigator did so. Finding she had "properly checked for conflicts, properly investigated it, [and] properly kept [Lopez] advised," the trial court denied his motion.

At Lopez's second *Marsden* hearing, on September 22, 2005, his attorney said she had found out just the day before that a colleague of hers in the public defender's office and her colleague's former three-striker client "had attempted to negotiate a deal" with

the district attorney's office calling for the client to testify against Lopez to "get a better deal for himself." Private counsel later substituted in for her colleague.

Lopez's attorney said the county public defender "specifically" instructed her she "was not authorized to withdraw from this case" but "should convey" to Lopez "all of the information" she had "about the situation." She said private counsel refused to let her talk with her colleague's former client. The trial court asked her if she was declaring a conflict. She replied, "I have been instructed that I'm not authorized to do that," but put on the record her own "considered opinion" that "there was an ethical breach." Her understanding of her assignment from the county public defender, she said, was to "equip Mr. Lopez with the information so that he could, could make this motion on a theory of conflict."

Lopez immediately did so. "Somebody knows something about my case and they're being represented by the public defender's office and is willing to testify against me," he said. Noting that the prosecutor did not intend to call his attorney's colleague's former client as a witness, the trial court found no conflict of interest and denied his motion.

At his third *Marsden* hearing, on August 8, 2006, Lopez informed the trial court that the county public defender had refused to respond to his inquiry whether his office had represented any codefendant or any other witness and that he had found out that the public defender's office represented Hector Solis, a witness in custody on a pending murder case. Lopez's attorney replied that once she brought the conflict to the attention of the deputy public defender representing Solis around the time of his preliminary hearing the public defender's office conflicted off the Solis case.

Additionally, Lopez informed the trial court that the public defender's office had represented other witnesses against him. His attorney replied that the public defender's office "did represent some of them at some time" but that she was aware of no open cases other than the Solis case. Finding neither a "classic conflict with witnesses" nor

"problems with the discovery or preparation of the defense" nor a "breakdown of the relationship" between attorney and client, the trial court denied Lopez's motion.

Now we turn to the colloquy in open court on May 16, 2007, immediately after the trial court adopted the county public defender's point of view that there was no conflict of interest. (*Ante*, part 8.) Lopez put on the record his refusal to waive, and his *Marsden* motion arising out of, the conflict of interest he perceived:

> "DEFENDANT LOPEZ: Excuse me. Can you put on record that I did not waive it.
>
> "THE COURT: Well –
>
> "DEFENDANT LOPEZ: It's my choice too.
>
> "THE COURT: Everything that's said here has been on the record.
>
> "DEFENDANT LOPEZ: I'm just letting it be known so I can be heard that I said it too, you know –
>
> "THE COURT: I understand.
>
> "DEFENDANT LOPEZ: I want that conflict.
>
> "THE COURT: I understand. Your position is clear.
>
> "[LOPEZ'S ATTORNEY]: I think he wants something else, too, Your Honor.
>
> "THE COURT: Don't ask me what he wants. [¶] So we'll be back here tomorrow morning at 9:30.
>
> "[LOPEZ'S ATTORNEY]: We are not quite finished yet, Your Honor.
>
> "THE DEFENDANT [LOPEZ]: As to a – a *Marsden* motion.
>
> "THE COURT: That's a little bit untimely at this point.
>
> "THE DEFENDANT [LOPEZ]: I'm asking for it.
>
> "THE COURT: Well –

"[LOPEZ'S ATTORNEY]: It arises from his position with respect to the conflict.

"THE COURT: I understand what your position is.

"[LOPEZ'S ATTORNEY]: His position.

"THE COURT: That's what I mean. You believe – you do believe there's a conflict; your attorney does not believe there's a conflict. I'm finding there's not a conflict. If I'm wrong, the Appellate Court will correct me.

"DEFENDANT LOPEZ: You're denying my *Marsden* motion too?

"THE COURT: I'm finding the *Marsden* motion to be not timely at this point.

"DEFENDANT LOPEZ: Well, you're denying it then.

"THE COURT: I am saying what I'm saying. You're not telling me what I'm saying.

"DEFENDANT LOPEZ: No. You're saying –

"THE COURT: You –

"DEFENDANT LOPEZ: You're saying it's not timely –

"THE COURT: Mr. Barajas –

"DEFENDANT LOPEZ: – and you're denying it.

"THE COURT: Mr. Barajas –

"[BARAJAS'S ATTORNEY]: Excuse me, Your Honor. Mr. Barajas is not talking to you.

"THE COURT: Mr. Lopez. I'm sorry. I stand corrected. You need to follow the rules of court.

"DEFENDANT LOPEZ: I understand that, but you're –

"THE COURT: And one of the rules is, Mr. Lopez, don't argue with the judge. If you need to talk to your attorney before we proceed, I will give you a chance to do that. I have made my findings.

"THE DEFENDANT [LOPEZ]: I don't understand what you're trying to tell me. Is he denying it?"

After Lopez and his attorney's colleague held an off-the-record discussion, the following colloquy ensued:

"[LOPEZ'S ATTORNEY'S COLLEAGUE]: My client is confused as to whether or not your decision that the *Marsden* is untimely is a denial of his motion or a –

"THE COURT: You can have all the time you need to explain it to him, then, as soon as we're done here.

"[LOPEZ'S ATTORNEY'S COLLEAGUE]: Except I'm not sure that I understand it myself, Judge.

"THE COURT: You can speak up anytime you want.

"[LOPEZ'S ATTORNEY'S COLLEAGUE]: My client is asking for a *Marsden* motion.

"THE COURT: I understand. The *Marsden* motion at this time would not be timely."

The trial court's *Marsden* ruling came hard on the heels of four developments during the conflict of interest colloquy in open court. First, the prosecutor granted Chavez use immunity, transactional immunity, and a release from custody in return for his testimony for the prosecution and for his waiver of any conflict of interest arising out of his prior representation by the public defender's office. Second, the county public defender denied the existence of a conflict of interest with Lopez arising out of his office's prior representation of Chavez. Third, Lopez declared, and refused to waive, a conflict of interest with the public defender's office. Fourth, the trial court found no conflict of interest. (*Ante*, part 8.)

In his attorney's words, Lopez's *Marsden* motion "arises from his position with respect to the conflict." From the record of the colloquy in open court immediately before his motion, a deteriorating attorney-client relationship is arguably inferable. "A criminal defendant is entitled to raise his or her dissatisfaction with counsel at any point

in the trial when it becomes clear that the defendant's right to effective legal representation has been compromised by a deteriorating attorney-client relationship." (*Roldan, supra,* 35 Cal.4th at p. 681.) "It is well settled that a criminal defendant, at any stage of the trial, must be given the opportunity to state reasons for a request for new counsel." (*People v. Mack* (1995) 38 Cal.App.4th 1484, 1487.) The question that arises on the record here is whether Lopez had that opportunity.

By "finding the *Marsden* motion to be not timely," perhaps the trial court meant that a *midtrial* motion is not timely. If so, that would be contrary to the law on the facts here. Although a trial court is entitled to deny as an impermissible disruption of the orderly processes of justice a midtrial *Marsden* motion belatedly challenging a pretrial ruling (*People v. Carr* (1972) 8 Cal.3d 287, 299), Lopez's *Marsden* motion arose from the four developments in the conflict of interest issue that the trial court, half a dozen attorneys, and he had just memorialized. Alternatively, by "finding the *Marsden* motion to be not timely," perhaps the trial court meant that he had already raised the conflict of interest issue at the three pretrial in camera *Marsden* hearings. Indeed, he had. Yet those hearings antedated the four conflict of interest developments that had just arisen.

Yet another possibility is that the trial court might have considered the colloquy in open court a *Marsden* hearing. The appointment of new counsel was the remedy Lopez sought not only by declaring a conflict of interest with the public defender's office but also by making a *Marsden* motion. Since "no single, inflexible procedure exists for conducting a *Marsden* inquiry," and since case law sometimes shows the prosecutor's presence during a *Marsden* hearing, the prosecutor's presence at the colloquy in open court was possibly of no consequence. (*People v. Madrid* (1985) 168 Cal.App.3d 14, 18 (*Madrid*), citing, e.g., *People v. Avalos* (1984) 37 Cal.3d 216, 231; *Harris v. Superior Court* (1977) 19 Cal.3d 786, 791.) An in camera *Marsden* hearing is "the better practice," but a *Marsden* hearing in open court is permissible where, as here, neither the defendant nor defense counsel asks for an in camera hearing and the defendant's

complaints neither disclose information that conceivably could lighten the prosecutor's burden of proof nor involve evidence or strategy to which the prosecutor is not privy. (*Madrid, supra,* at p. 19; *People v. Stewart* (1985) 171 Cal.App.3d 388, 395, disapproved on another ground in *People v. Smith* (1993) 6 Cal.4th 684, 696, as stated in *People v. Bolin* (1998) 18 Cal.4th 297, 346, fn. 16.) So a *Marsden* motion requesting the *Marsden* hearing that had just occurred could, among other things, be considered not timely.

Lamentably, the record before us fails to clarify the trial court's enigmatic comment. So we agree with Lopez and the Attorney General that the denial of Lopez's *Marsden* motion as "not timely" was error. In the usual case, *Marsden* error requires a new trial since an inadequate record denies meaningful appellate review. (*Marsden, supra,* 2 Cal.3d at p. 126.) Yet no indication of ineffective assistance of counsel is in the record, the trial was free of error, and the only outstanding issue is the *Marsden* motion arising from the conflict of interest issue. In light of that set of unique circumstances, we will reverse the judgment and remand the matter with directions to the trial court to conduct a posttrial *Marsden* hearing and to exercise judicial discretion to order a new trial, reinstate the judgment, or proceed otherwise as authorized by law. (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1400-1402; *People v. Maese* (1985) 168 Cal.App.3d 803, 808-810; *People v. Minor* (1980) 104 Cal.App.3d 194, 199-200 (*Minor*) and cases cited; cf. *People v. Moore* (2006) 39 Cal.4th 168, 174 [citing *Minor* with approval]; *People v. Hall* (1983) 35 Cal.3d 161, 170 [same].)

DISPOSITION

As to both judgments, the matter is remanded with directions to the trial court to strike the section 1203.1l restitution fines, to issue amended abstracts of judgment, and to send certified copies to the Department of Corrections and Rehabilitation. Barajas and Lopez have no right to be present at those proceedings. (See *People v. Price* (1991) 1 Cal.4th 324, 407-408, superseded by statute on another ground as stated in *People v.*

Hinks (1997) 58 Cal.App.4th 1157, 1161-1165.) Otherwise, Barajas's judgment is affirmed.

Lopez's judgment is reversed and remanded with directions to the trial court to conduct a posttrial *Marsden* hearing and exercise judicial discretion to order a new trial, to reinstate the judgment, or to proceed otherwise as authorized by law. (§ 1260.) Lopez has the right to be present at those proceedings.

_____
Gomes, J.

WE CONCUR:

_____
Wiseman, Acting P.J.

_____
Dawson, J.